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### Realizing the Promise of Justice: Proposing a First Amendment Test to Protect Against Unjust IEEPA Sanctions

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Realizing the Promise of Justice: Proposing a First Amendment  
Test to Protect Against Unjust IEEPA Sanctions

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## I. INTRODUCTION

Fatou Bensouda remembers being a strong proponent of human rights even at a young age in her hometown in Gambia.<sup>1</sup> From a formative age and throughout her life, she has followed a path always leading toward justice.<sup>2</sup> Elected as deputy prosecutor at the International Criminal Court (ICC) in 2004, Bensouda was then elected as the first female prosecutor at the ICC in 2011.<sup>3</sup> In her role as Prosecutor for the ICC Bensouda is responsible for determining cases that should be heard before the Court, gathering facts from the States concerned in the matter, and helping to determine whether the Office should proceed with

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<sup>1</sup> See David Pilling, *Fatou Bensouda: 'It's about the law. It's not about power,'* FINANCIAL TIMES (Sept. 25, 2020), <https://www.ft.com/content/beeb8dba-ce3c-4a33-b319-3fcff0916736> (recalling that at age eleven, Bensouda's response to domestic abuse was "even at that age, I would say 'No. That is wrong.'").

<sup>2</sup> See e.g., *id.* (discussing Bensouda's advocacy for women in abusive households in her home village and her advisory role within the UN International Criminal Tribunal for Rwanda).

<sup>3</sup> See e.g., *id.* (detailing Bensouda's legal background in private practice and her public interest work with the UN and the ICC).

investigations.<sup>4</sup> These investigatory actions involve a multi-phase process where each phase may result in the case being dismissed and not proceeding to trial.<sup>5</sup> To pass even the preliminary phases, it must be shown that the ICC has jurisdiction to hear the case.<sup>6</sup>

In April 2020 the ICC reauthorized an investigation into alleged acts of torture, cruel treatment, and other war crimes committed by the United States in Afghanistan.<sup>7</sup> As a result of

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<sup>4</sup> See The Office of the Prosecutor, *Report on Preliminary Examination Activities 2020*, INTERNATIONAL CRIMINAL COURT 1, 3 (2020), <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (describing the multi-phase process of proceeding with a case within the ICC as hinging on consideration of jurisdiction, admissibility, and the interests of justice).

<sup>5</sup> See *id.* at 68 (detailing that Ukraine has been under preliminary examination for over six years - since April 2014).

<sup>6</sup> See *id.* at 3 (listing two elements of establishing jurisdiction as (i) temporal jurisdiction (whether the action took place after the Rome Statute came into force) and (ii) either territorial or personal jurisdiction (whether the crime was committed on the territory or by a national of a State Party)).

<sup>7</sup> Owen Bowcott, *Senior ICC Judges Authorise Afghanistan War*

the renewed investigation into these alleged war crimes, former President Trump declared a national emergency and authorized imposition of sanctions against anyone found to be supporting the ICC's investigation.<sup>8</sup> The Trump administration believed the investigations constituted a direct attack on the safety of United States citizens who may be implicated in the proceedings.<sup>9</sup> Although Bensouda stated that as Prosecutor for the ICC, she approaches all of her cases with the mindset that no matter who the defendant is, "it's about the law. It's not about the power[,] " the Trump administration believed her actions were a

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*Crimes Inquiry*, The Guardian (Mar. 5, 2020 5:04 AM)

<https://www.theguardian.com/law/2020/mar/05/senior-icc-judges-authorise-afghanistan-war-crimes-inquiry> (announcing that ICC judges overturned a cessation of inquiries and reauthorized investigation of CIA black sites and activities in Afghanistan).

<sup>8</sup> See Exec. Order No. 13928, 85 Fed. Reg. 36,139, 36,139 (June 11, 2020) [hereinafter E.O. 13928] (declaring a national emergency due to the ICC's "illegitimate" claim of jurisdiction over and investigation into the U.S.'s actions in Afghanistan).

<sup>9</sup> See e.g., Remarks to the Press, Michael R. Pompeo, Secretary of State (June 11, 2020) (on file with author) (painting a mental image of a U.S. citizen being imprisoned in a foreign prison during vacation as a result of the ICC's investigations).

threat to national security.<sup>10</sup> Due to her continued work for the ICC, the United States State Department placed Bensouda and another prominent ICC figure on the Specially Designated Nationals and Blocked Persons List (the "SDN List").<sup>11</sup> As a result of this designation any assets Bensouda possessed in the United States or that fell under the jurisdiction of the United States were blocked (i.e. frozen), and she was prohibited from accessing them.<sup>12</sup> Further, due to the nature of the designation,

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<sup>10</sup> See David Pilling, *supra* note 1 (demonstrating Bensouda's commitment to justice and her unwillingness to be intimidated).

<sup>11</sup> See Press Statement, Michael P. Pompeo, Secretary of State, Secretary of State, Actions to Protect U.S. Personnel From Illegitimate Investigation by the International Criminal Court (Sept. 2, 2020) (on file with author) (announcing Bensouda and Mochochoko's blocking from support of U.S. Persons because of their involvement with ICC investigations into U.S. personnel).

<sup>12</sup> See E.O. 13928, *supra* note 8 (prohibiting the making of contributions in funds, goods, or services to designated individuals directly or indirectly); see also *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable List* <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons->



U.S. Persons who supported Bensouda directly or indirectly through monetary transactions or professional support were exposed to potential liability.<sup>13</sup>

Bensouda is only one individual on the SDN List though; the power of the President to enact similar restrictions on individuals, countries, or organizations is vested by the International Emergency Economic Powers Act (IEEPA).<sup>14</sup> Under the same executive order (E.O.). that authorized the designation of Bensouda on the SDN List, Phakiso Mochochoko - the Head of the Jurisdiction, Complementarity and Cooperation Division of the

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list-sdn-human-readable-lists [hereafter SDN List] (explaining that when someone is designated to the SDN List all assets obtained via the United States will be blocked automatically).

<sup>13</sup> See Exec. Order No. 13928 *supra* note 8 at §3(a)-(b) (reiterating that direct and indirect support of designated individuals or the receiving of direct or indirect support from a designated individual is prohibited for all U.S. persons).

<sup>14</sup> Accord Adam Szubin, *Sanctions 101, Part I of II: A Powerful Financial Tool*, TREASURY NOTES BLOG (May 30, 2014) (granting the President, under IEEPA, the power to declare national emergencies and impose financial sanctions in response to subjectively categorized national security threats).

ICC - was designated.<sup>15</sup> These two human rights activists are listed alongside known terrorists,<sup>16</sup> narcotics traffickers,<sup>17</sup> and other parties affiliated with sanctioned countries.<sup>18</sup> Since 1990, Presidents have declared multiple new national emergencies each year and reaffirmed existing emergencies, resulting in the average national emergency under IEEPA lasting nearly a decade with more than thirty concurrent IEEPA sanctions programs active at the time of writing this Comment.<sup>19</sup>

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<sup>15</sup> See Press Release, Secretary of State, *supra* note 11

(announcing Bensouda and Mochochoko's designation under the ICC sanctions regime for supporting investigating U.S. personnel).

<sup>16</sup> See e.g., Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) [hereinafter E.O. 13224] (designating multiple parties who are known associates of terrorist organizations).

<sup>17</sup> See e.g., Foreign Narcotics Designation Act, Letter Reporting on Sanctions, 36 Weekly Comp. Pres. Doc. 1262 (June 1, 2000) (announcing twelve individuals to be sanctioned pursuant to §804(b) of the Foreign Narcotics Kingpin Act).

<sup>18</sup> See Adam Szubin, *supra* note 14 (explaining that OFAC draws on public and private information when making designations).

<sup>19</sup> See CHRISTOPHER A. CASEY ET AL, CONG. RESEARCH SERV., R45618, INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 18

This Comment argues that IEEPA has granted the President of the United States too much unilateral power to determine the course of global economic interactions and individuals' access to resources, and that this power should be limited by the judiciary by expanding the use of First Amendment protections for those who face liability resulting from interactions with parties on the SDN List.<sup>20</sup> Part II describes the statutory history of IEEPA, the use of presidential power granted by IEEPA to determine the course of United States foreign affairs and political relationships, and the case law precedent surrounding First Amendment constitutional challenges to IEEPA.<sup>21</sup> Part III argues that the current use of IEEPA allows the President to violate the First Amendment and Congress's intent in drafting

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(2020) (reporting that 1.5 new national emergencies are declared and an average of 4.5 E.O.'s citing IEEPA are issued per year).

<sup>20</sup> See *infra* Part III and IV (arguing that the Judiciary can limit the President's power under IEEPA by using a modified First Amendment intermediate scrutiny test to protect global citizens from the unilateral influence of one individual).

<sup>21</sup> See *infra* Part II (establishing the procedural history of IEEPA and related statutes, the resulting lack of controls put on the President, a summary of First Amendment challenges to IEEPA, and historically used intermediate scrutiny tests).

and amending IEEPA, and proposes a new test to be employed by the judiciary to protect First Amendment rights in IEEPA cases.<sup>22</sup> Part IV recommends that First Amendment rights create a weighty and important policy compelling federal courts to use their interpretation power to constrain the President's actions under IEEPA, and argues that the judiciary exercising this power allows for free speech protection in the absence of a Congressional amendment to IEEPA passing.<sup>23</sup> Part V concludes by reiterating that sanctions have a distinct purpose and IEEPA has historically allowed the President to go beyond this purpose and hold too broad of unilateral power, and thus should be constrained in the interest of First Amendment rights.<sup>24</sup>

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<sup>22</sup> See *infra* Part III (asserting that the current use of IEEPA by the President violates the legislative intent of the statute and proposing a modified intermediate scrutiny test to protect First Amendment freedom of speech from undue restrictions).

<sup>23</sup> See *infra* Part IV (recommending that the protection of First Amendment rights is crucial for the courts to uphold and asserting that this is within the court's power and in the best interest of justice for courts to limit IEEPA power in the absence of congress amending IEEPA).

<sup>24</sup> See *infra* Part V (concluding that the President's broad powers

## II. BACKGROUND

### A. History of IEEPA

Economic sanctions are used by the United States as a strategic mechanism to alter the behaviors and decisions of state and nonstate actors that threaten the security of the United States or its interests.<sup>25</sup> Currently the primary authority for enacting economic sanctions is IEEPA, but IEEPA's predecessor - that authorized many of the same actions - was the Trading with the Enemy Act (TWEA).<sup>26</sup> TWEA was enacted by Congress, in part, to grant the President broad power to take control of private property for public use during times of war.<sup>27</sup>

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under IEEPA are ultimately harmful to American citizens and the global economy and must be constrained).

<sup>25</sup> See Perry S. Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 Mo. L. REV. 1, 1 (2018) (positing that economic sanctions are political and economic tools used by powerful governments to influence other nations).

<sup>26</sup> See H.R. REP. NO. 95-459, at 2 (1977) (detailing that IEEPA adopts many of the powers from TWEA, but not all).

<sup>27</sup> See CHRISTOPHER A. CASEY ET AL, *supra* note 19 at 5-6 (stating that TWEA granted the executive control over international trade, investment, migration, and communications between the United States and its enemies).

In the 1970s Congress formed a bipartisan commission to reevaluate the necessity and extent of power granted to the President under TWEA after realizing that the United States was under a continuous state of national emergency for over three decades.<sup>28</sup> As a result of the findings of this commission, Congress moved to reform the emergency powers under TWEA by first enacting the National Emergencies Act (NEA) in 1976 and IEEPA shortly thereafter.<sup>29</sup> As a strategy to constrain the executive's unilateral power, IEEPA was to confer specific powers to the President in times of national emergencies that narrowed the scope of TWEA and imposed more oversight via procedural limitations.<sup>30</sup>

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<sup>28</sup> See *id.* at 6-7, n.45 (stating that the Special Committee reevaluated the delegation of emergency authority to the President and concluded that "the United States had technically 'been in a state of national emergency since March 9, 1933'").

<sup>29</sup> See *id.* at 8-9 (explaining that the NEA gives power to IEEPA and the purpose of enacting IEEPA was to create more oversight for the President and limit certain powers to emergencies).

<sup>30</sup> See *id.* at 7 (citing H.R. REP. NO. 95-459 (1977)) (acknowledging that Congress was worried TWEA granted the President too great of unilateral power).

*i. Statutory Limitations on IEEPA Powers, Namely the Berman Amendment.*

A number of items are categorically exempted from presidential influence under IEEPA: namely humanitarian aid, travel and travel related activities, exchange of informational material, and personal communications.<sup>31</sup> These exemptions serve as the primary limitations on the President's use of IEEPA because Congress's oversight power requires a veto-proof majority to overturn the President's actions under IEEPA.<sup>32</sup> Many of the exceptions existed in the original drafting of IEEPA but as the result of a later amendment - commonly known as the Berman Amendment or informational materials exemption - IEEPA also protects the exchange of informational material.<sup>33</sup>

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<sup>31</sup> See also 50 U.S.C. §1702(b)(1)-(4) (excepting personal communication, certain donations, exportation of informational materials, and travel related transactions as the only statutory restrictions on presidential sanction power).

<sup>32</sup> See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that a veto provision is unconstitutional if it allows one House of Congress to invalidate the decision of the Executive Branch).

<sup>33</sup> See 50 U.S.C. § 1702(b)(3) (amending the IEEPA to protect exchange of "information or informational materials" and including a non-exhaustive list of examples).

The Berman Amendment was legislated in response to worries that the President had too much power to infringe on constitutional rights with the breadth of economic sanctions.<sup>34</sup> The text reads, in part, "[t]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly . . . the importation from any country, or the exportation to any country, . . . of any information or informational materials" and goes on to enumerate a non-exhaustive list of items that are protected.<sup>35</sup> The Amendment was adopted in 1979 and risked becoming obsolete in an age of technology if not for the key phrase "included but not limited to," that gave courts the power to maintain the Amendment's relevance.<sup>36</sup> On the plain language of the Amendment,

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<sup>34</sup> See *Revision of Trading with the Enemy Act: Markup of H.R. 7738 Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 5 (1977) (believing that TWEA must be reformed because the statute granted the President "dictatorial powers").

<sup>35</sup> See 50 U.S.C. §1702(b)(3) ("including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds").

<sup>36</sup> See e.g., *Cernuda v. Heavey*, 720 F. Supp. 1544, 1549, 1551



it applies to imports and exports from countries, but does not specify how the exception should be applied when individuals or organizations are sanctioned.<sup>37</sup> Courts have disregarded this plain reading of the Amendment in many cases and opted to read the text without consideration for the word "country" as a defining aspect.<sup>38</sup> For example, following Donald Trump's declaration of a national emergency and attempt to impose sanctions on TikTok, the court in *Marland v. Trump* held that the videos created and distributed on the social media platform constitute informational material that are protected by the

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(S.D. Fla, 1989) (holding that although art is not enumerated artwork falls under the "and other informational materials" classification and is protected by the Berman Amendment regardless of alleged propagandic content).

<sup>37</sup> Compare 50 U.S.C. §1702(b)(3) (specifying it relates to importation and exportation of information to countries) with 50 U.S.C. §1702(b)(2) (lacking reference to country or territory).

<sup>38</sup> See e.g., *Marland v. Trump*, No. 20-4597, 2020 U.S. Dist. Lexis 202572, at \*23 (E.D. Penn. Oct. 20, 2020) (stating that the TikTok prohibition indirectly regulates the exchange of informational materials on the web application).

Berman Amendment.<sup>39</sup> This interpretive move has allowed courts to maintain the Amendment's relevance in an era of globally reaching technology.<sup>40</sup>

ii. *Presidential Powers and Procedure Under IEEPA*

Under IEEPA, the President's powers may only be exercised "to deal with an unusual and extraordinary threat" that originates outside of the United States but nevertheless has a substantial impact on "the national security, foreign policy, or economy."<sup>41</sup> If the President perceives and declares such a national emergency, they may then act pursuant to the procedure in the NEA and promulgate sanctions using IEEPA.<sup>42</sup> Once the

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<sup>39</sup> See *id.* at \*25 (finding that the sanctions against TikTok would have the effect of preventing the exchange of informational materials created and posted to the app).

<sup>40</sup> See *id.* at \*20 (finding that videos on TikTok are protected because they are analogous to artwork, photographs, and films).

<sup>41</sup> See 50 U.S.C § 1701 (stating that IEEPA may be applied to any unusual and extraordinary threat with minimal limitation on the subjectively perceived threat).

<sup>42</sup> See National Emergencies Act, 94 Pub. L. 412, 90 Stat. 1255 (1976) (conferring power to IEEPA as a statute that may promulgate economic sanctions and that is then given over to the

President has declared a national emergency and created a sanctions structure under IEEPA, they must immediately report to Congress specifying (1) the circumstances that necessitate the exercise of their IEEPA authority; (2) why they believe the situation constitutes an unusual and extraordinary threat to the national security, foreign policy, or economy of the United States; (3) the specific authorities to be exercised and actions planned; (4) why they believe those actions are necessary; and (5) any foreign countries against which actions are to be taken including why those actions are necessary.<sup>43</sup> This process is typically accomplished through the use of a Presidential E.O. that is published in the Federal Register stating that there is an extraordinary and unusual threat that must be neutralized or addressed.<sup>44</sup> IEEPA further requires the President to consult

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President's use by Congress).

<sup>43</sup> See 50 U.S.C. § 1703(b) (directing the President to notify Congress, within a short period of time, of any subjective reasons for declaring a national emergency).

<sup>44</sup> See Ari Shapiro, *What a President Can Do Under the International Emergency Economic Powers Act*, NPR ALL THINGS CONSIDERED (May 31, 2019) <https://www.npr.org/2019/05/31/728754901> (maintaining that the President need only issue an E.O. with the magic words "extraordinary and unusual threat").

with Congress "in every possible instance" before exercising IEEPA authorities.<sup>45</sup> Under the NEA an emergency declared by the President under IEEPA may only be terminated by the President, a resolution of Congress with a veto-proof majority, or if the President does not follow proper procedure in continuing the properly publish notice of continuation of the emergency.<sup>46</sup>

iii. *Office of Foreign Asset Control Implementation Power*

As the statute currently stands, the President has the power - after the proper procedure is effectuated - to freeze assets of foreign individuals, organizations, or countries deemed to fall under the national emergency.<sup>47</sup> This is not an

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<sup>45</sup> See, 50 U.S.C. § 1703(a) (codifying the requirement that Congress be consulted "whenever possible" without specifying the subject matter or form of the consultation).

<sup>46</sup> See 50 U.S.C. § 1622 (mandating that a declaration of continued emergency must be published ninety days prior to its annual anniversary to continue the emergency for the next year, but if this is not done a new emergency may be declared regarding the same event).

<sup>47</sup> See 50 U.S.C. § 1701(a) (granting Presidents the power to investigate and block individuals as necessary within the economic sanctions and international trade regimes).

action that the President themselves generally perform though, this enforcement power is delegated by the President to the Department of Treasury and its Office of Foreign Assets Control (OFAC).<sup>48</sup> Because the President and OFAC do not typically have jurisdiction or power to directly control the foreign threat identified, the focus of enforcement is on transactions within the United States and on U.S. Persons, wherever located.<sup>49</sup> These controls are actualized as prohibitions, rules, and licenses published by the Department of Treasury in the Code of Federal Regulations and on OFAC's website that must be complied with by all U.S. Persons and other persons subject to U.S. jurisdiction.<sup>50</sup> When OFAC determines a person meets certain criteria articulated in a sanctions program, OFAC "designates"

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<sup>48</sup> See S. REP. NO. 110-82, at 1-2 (2007) (detailing the President's power to propose the imposition of economic sanctions and OFAC's designated duty to be administrator and enforcer of sanctions related activity).

<sup>49</sup> See 31 C.F.R. §560.314 (2021) (defining U.S. persons as a U.S. citizen, permanent resident alien, entity organized under U.S. law, or any person physically located in the United States).

<sup>50</sup> See e.g., 31 C.F.R. §560.201 (specifying OFAC's regulations prohibiting the importation of goods from Iran and obtaining power, in part, through the pronouncement of E.O 12613).

the person, meaning the person becomes listed on the SDN List which is published on OFAC's website as well as the Federal Register.<sup>51</sup> The penalty for violating sanctions and dealing with blocked persons or countries is multifold and varies from strict liability with civil damages to criminal liability enforced by the Department of Justice.<sup>52</sup> Individuals may be removed from the SDN List as the result of a terminated national emergency, a successful petition for removal from the SDN list, or as a result of other extraordinary circumstances.<sup>53</sup>

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<sup>51</sup> See SDN List, *supra* note 12 (publishing a list of individuals determined, by the government, to be acting on behalf of or in support of sanctioned governments or activities).

<sup>52</sup> See Inflation Adjustment of Civil Monetary Penalties, 86 Fed. Reg. 14,534, 14,535 (Mar. 17, 2021) (to be codified at 31 C.F.R. pt. 501) (announcing adjusted civil penalty for IEEPA sanctions to be a maximum of \$311,532); see also Amber Vitale, et al, *OFAC Will See You Now*, HARV. L. FORUM ON CORP. GOV. (Feb. 2, 2021), <https://corpgov.law.harvard.edu/2021/02/02/ofac-will-see-you-now/> (averring that OFAC and DOJ's separate charging structures permit civil and criminal penalties for the same infraction).

<sup>53</sup> See 31 CFR § 501.807 (permitting any designated person to challenge their designation if they believe there was

### *B. Current Trends of IEEPA Sanctions*

Although IEEPA was initially implemented to constrain Presidential emergency authority, IEEPA had the effect of expanding the scale, scope, and frequency of Presidential emergency authority usage.<sup>54</sup> Emergencies under IEEPA have a tendency to span longer periods of time compared to those declared under TWEA, and consequentially the number of ongoing national emergencies has continued to increase almost continuously since the enactment of IEEPA.<sup>55</sup> For instance, the

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insufficient basis for their designation originally), see also Notice of OFAC Sanctions Actions, 86 Fed. Reg. 22101, 22102 (Apr. 26, 2021) (removing Bensouda and Mochochoko from the SDN List as a result of President Biden's E.O. terminating the national emergency with regards to the ICC).

<sup>54</sup> See CHRISTOPHER A. CASEY ET AL, *supra* note 19 at 8, 17 (reporting that over forty-three years Presidents invoked IEEPA in fifty-nine national emergencies with thirty-three concurrent emergencies involving IEEPA active as of July 1, 2020).

<sup>55</sup> Compare *id.* at 18-19 (stating that the longest standing IEEPA sanctions regime was declared in 1979 and is still in effect) with FRANK CHURCH AND CHARLES MCC. MATHIAS, *Forward*, A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES, A WORKING PAPER, at v (1974)

first national emergency declared under IEEPA was declared in 1979 and as of March 2021 is still active.<sup>56</sup> While all emergencies declared under TWEA were geographically tied, under IEEPA non-geographically-specific emergencies are declared with more frequency.<sup>57</sup> Declarations of emergencies in response to amorphous non-geographically-specific threats has resulted in effectuating broad application of sanctions.<sup>58</sup> Sanctions programs or regimes are currently in place for threats such as the proliferation of chemical and biological weapons<sup>59</sup> and

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(observing that Presidents used TWEA to keep America under national emergencies for sixty-four consecutive years).

<sup>56</sup> See Continuation of the National Emergency with Respect to Iran, 85 Fed. Reg. 72895, 72895 (Nov. 12, 2020) (reaffirming the emergency declared in November 1979 for the forty-second year).

<sup>57</sup> See CHRISTOPHER A. CASEY ET AL, *supra* note 19 at 17 (positing that Presidential use of national emergencies expanded in scale, scope, and frequency under IEEPA as the successor to TWEA).

<sup>58</sup> See *id.* (observing that non-geographic IEEPA sanctions authorize targeting persons and groups instead of governments).

<sup>59</sup> See Exec. Order. No. 13382, 70 Fed. Reg. 38,565 (June 28, 2005) (designating organizations believed to be proliferating weapons of mass destruction).



threats to commit terrorism.<sup>60</sup> In addition to these nebulous threats, the stated reasons for declaring a national emergency allow vague statements to qualify a situation as a national emergency thus allowing the President to target organizations, groups, or individuals.<sup>61</sup>

*C. Constitutional ties to IEEPA.*

When plaintiffs challenge IEEPA on Fifth Amendment grounds they generally fail regardless of whether the allegation is of an unconstitutional taking, unconstitutional vagueness, or otherwise.<sup>62</sup> Challenges to IEEPA itself as being

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<sup>60</sup> See Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (blocking the property of persons who commit or support terrorism by freezing their assets connected to the U.S.).

<sup>61</sup> See CHRISTOPHER A. CASEY ET AL, *supra* note 19 at 21 (explaining that rationales initially included reference to specific geography or actions of a government, but rational is now vague); see e.g., Exec. Order No. 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979) (referencing, vaguely, "the situation in Iran" as grounds for declaring a national emergency).

<sup>62</sup> See e.g., Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F.Supp. 2d 57, 78 (D.D.C. 2003) (indicating that assets blocked pursuant to IEEPA sanctions are not unconstitutional takings

unconstitutional also fail as courts recognize that Congress was within its right to grant the President the statutory authority and the President is permitted to delegate granted authorities to other government agencies.<sup>63</sup> The most successful IEEPA challenge are First Amendment challenges arguing that IEEPA infringes on plaintiff's freedom of speech.<sup>64</sup>

*i. Grounds for First Amendment Challenges*

The text of the First Amendment protects against acts that infringe on freedoms of speech, press, peaceful assembly, and petition.<sup>65</sup> Throughout years of First Amendment caselaw, the Supreme Court has expanded First Amendment protections to include more activities categorized under the four areas of

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because the taking is temporary).

<sup>63</sup> See e.g., *United States v. Dhafir*, 461 F.3d 211, 212-13 (2d Cir. 2006) (holding that IEEPA constitutes an appropriate delegation of congressional authority to the Executive).

<sup>64</sup> See e.g., *Open Soc'y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*29 (S.D.N.Y., Jan. 04, 2021) (holding that the IEEPA sanctions chilled a significant amount of protected speech activities).

<sup>65</sup> See U.S. CONST. amend. I (prohibiting Congress from making laws that infringe on the freedom of speech).

protection listed in the text.<sup>66</sup> To bring a case under the First Amendment a plaintiff must have standing, a justiciable claim, and establish a challenge on one of two grounds: facial challenges and/or as-applied challenges.<sup>67</sup> Facial challenges arise when Plaintiffs argue that a law should be invalidated because the government imposed law, rule, regulation, or policy is unconstitutional as written.<sup>68</sup> Conversely, an as-applied First Amendment challenge arises when Plaintiffs argue that a

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<sup>66</sup> See e.g., David L. Hudson Jr., *Freedom of Association*, The First Amendment Encyclopedia (2009), <https://www.mtsu.edu/first-amendment/article/1594> (explaining that, although not enumerated in the First Amendment, the freedom of association is recognized by courts as a fundamental right).

<sup>67</sup> See MARY KEENEY & SUSAN G. CONWAY, *CONSTITUTIONAL CHALLENGES TO STATE STATUTES AND RULES*, 1 (17th ed. 2005) (detailing that cases are permissible to bring to court if the Plaintiff has standing (real controversy), the question is justiciable (shows a First Amendment violation is likely to occur), and the case is ripe (the facts show infringement)).

<sup>68</sup> See David L. Hudson Jr., *Facial Challenges*, The First Amendment Encyclopedia (2009), <https://www.mtsu.edu/first-amendment/article/954> (positing that facial challenges often allege that laws are overbroad or vague).

government imposed law, rule, regulation, or policy is unconstitutional as applied to the plaintiffs' individual situation.<sup>69</sup> Facial challenges often precede as-applied challenges, thus when a Plaintiff does not succeed on their facial challenge they may bring and succeed on an as-applied challenge.<sup>70</sup> Courts have shown a preference for as-applied challenges to provide a narrower remedy rather than upholding a facial challenge that may overrule the democratic law making process.<sup>71</sup> Facial and as-applied challenges also result in different possibilities of relief: facial challenges seek to invalidate an entire government rule whereas an as-applied challenge will narrow a government rule's applicability without

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<sup>69</sup> See David L. Hudson Jr., *As-applied Challenges*, The First Amendment Encyclopedia (2009), <https://www.mtsu.edu/first-amendment/article/892>(explaining that as-applied challenges are used to avoid premature decisions).

<sup>70</sup> See David L. Hudson Jr., *supra* note 64 (reporting that courts may strike down a facial challenge and subsequently accept an as-applied challenge on the same facts).

<sup>71</sup> See David L. Hudson Jr., *supra* note 65 (stating that courts prefer as-applied challenges, but some courts struggle to delineate between the categories).

abolishing it.<sup>72</sup>

ii. *First Amendment Challenges to IEEPA Sanctions Regimes*

Historically, the most successful arguments challenging IEEPA sanctions have been First Amendment challenges claiming a sanctions regime unduly limits the rights of freedom of speech or association.<sup>73</sup> Not all of these cases have been successful, for example in *Al Haramain Islamic Foundation v. Department of the Treasury*, the court held that IEEPA sanction do not unjustly infringe on enough of the Plaintiff's First Amendment free speech to justify granting an injunction.<sup>74</sup> Conversely, the recent case of *Open Society Justice Initiative* found that the only viable path to grant injunctive relief was under the First

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<sup>72</sup> See *id.* (emphasizing that as-applied challenges are preferred by the courts over facial challenges to protect the judiciary from infringing on executive power).

<sup>73</sup> But see *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 161 (D.C. Cir. 2003) (holding that the Government's actions satisfy necessary scrutiny and do not violate Plaintiff's First amendment rights).

<sup>74</sup> See 585 F. Supp. 2d 1233, 1267 (holding that Plaintiffs could not prove using extended hypotheticals that the First Amendment infringements warranted relief for themselves).

Amendment.<sup>75</sup> In *Open Society*, the Plaintiffs consisted of numerous dual-citizen American legal scholars who regularly worked with the ICC.<sup>76</sup> These scholars challenged the implementation of E.O. 13928 enacting broad sanctions prohibiting “any contribution or provision of funds, goods, or services” for any person designated pursuant to the Order.<sup>77</sup> The Plaintiffs only succeed on the First Amendment claim that the E.O. - and following regulations - unjustly prohibited Plaintiffs from engaging in certain speech and advocacy in support of the ICC, and thus exposed Plaintiffs to civil and criminal liability for engaging in constitutionally protected

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<sup>75</sup> See *Open Soc’y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*31 (S.D.N.Y., Jan. 04, 2021) (holding in favor of the government on Plaintiff’s APA challenge, Fifth Amendment challenge, and as-applied First Amendment challenge).

<sup>76</sup> See *id.* at \* 11-15 (establishing the Plaintiffs as dual citizens of the United States and other countries, plus law professors at four different law schools).

<sup>77</sup> See *id.* at \*9 (citing Exec. Order No. 13928, 85 Fed. Reg. 36,139 (June 11, 2020)) (showing that the language of the executive order provided a broad basis for the sanctions regime and could encompass a variety of activities and conduct).

speech or advocacy.<sup>78</sup> Although the Government argued that the regulations were content-neutral and/or justified by the compelling national security interest, the court found that the Plaintiff's interactions with the ICC would likely qualify as a "service" under the sanctions regime and that this limiting would be subject to strict scrutiny.<sup>79</sup> As a result, injunctive relief was granted to the Plaintiffs because the E.O. impermissibly restricted speech protected by the First Amendment.<sup>80</sup>

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<sup>78</sup> See *id.* at \*15-\*17 (outlining Plaintiffs' claims as including a First Amendment challenge, a Fifth Amendment challenge, an *ultra vires* challenge, and a challenge to OFAC's actions under the APA; stating that the only claim the Plaintiffs have a likelihood of succeeding under is the First Amendment claim).

<sup>79</sup> See *id.* at \*23-\*24 (confirming that the speech-related activities the Plaintiffs seek to participate in regarding the ICC likely qualify as services that are "directly or indirectly in benefit" of SDNs and thus the desired speech is likely to be prohibited under the Order and the Regulations).

<sup>80</sup> *Id.* at \*29-\*30, \*39 (enjoining the government from enforcing civil penalties on Plaintiffs' for the specifically presented and potentially violative actions).

iii. *Historically Used First Amendment Tests That May Apply to IEEPA Litigation.*

There are three primary standards used for analyzing potential First Amendment violations: strict scrutiny, intermediate scrutiny, and rational basis review.<sup>81</sup> In cases regarding IEEPA and the First Amendment, courts are varied in application of scrutiny and tests, but strict scrutiny and intermediate scrutiny are often used interchangeably and come to similar results.<sup>82</sup> Content-neutral regulations are subject to intermediate scrutiny while content-based regulations are subject to strict scrutiny.<sup>83</sup> One intermediate scrutiny test

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<sup>81</sup> See David L. Hudson, Jr., *Substantial Government Interest*, THE FIRST AMENDMENT ENCYCLOPEDIA (2019) <https://www.mtsu.edu/first-amendment/article/1615> (explaining that under strict scrutiny the substantial-government must have an extremely important - interest, intermediate scrutiny requires a slightly lesser "substantial interest," and rational basis a more lenient "legitimate interest" must be established).

<sup>82</sup> Cf. *Open Soc'y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*30, \*29 n.7 (applying strict scrutiny to the First Amendment challenge but that intermediate scrutiny would reach the same result).

<sup>83</sup> See David L. Hudson, Jr., *supra* note 75 (stating that rational



related to IEEPA was used in *Humanitarian Law Project v. Reno*.<sup>84</sup> In *Humanitarian Law Project v. Reno* the court applied four questions: (1) is the regulation with the power of the government, (2) does it promote an important or substantial government interest, (3) is that interest related to suppressing free expression, and (4) is the incidental restriction on First Amendment freedoms no greater than necessary?<sup>85</sup> There also exists a final balancing test commonly used that requires the court to consider the effect of granting or denying relief to each party with particular attention paid to the public consequences of granting or denying the relief.<sup>86</sup>

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requires legitimate interest, intermediate requires substantial interest, and strict requires a compelling interest).

<sup>84</sup> *Cf.* *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000) (applying an element test to cases of First Amendment challenges where intermediate scrutiny is necessary).

<sup>85</sup> *See id.* at 1136 (holding in favor of the government and that all questions were answered in the affirmative).

<sup>86</sup> *See* 725 Eatery Corp. v. N.Y.C., 408 F. Supp. 3d 424, 469 (S.D.N.Y. 2019)) (explaining that courts must balance competing claims of injury between parties, but in cases where the government is a party the public's interest becomes the pertinent factor rather than the government's interest).

### III. ANALYSIS

A. *The Scope of Power IEEPA has Granted is Overly Broad Because It Goes Beyond What Congress Intended When Drafting the Statute.*

The scope of power IEEPA has inadvertently granted the President runs afoul of IEEPA's intended purpose of constraining the President's power and increasing Congressional oversight.<sup>87</sup> The purpose for using IEEPA to amend TWEA was to constrain the power of the President with congressional review and place a limit on the over-exuberant use of sanctions, but the result has expanded presidential power and severely limited congressional oversight.<sup>88</sup> The first sanctions regime put into place under IEEPA is still in effect today, over forty years after its inception, and since 1997 consists of a comprehensive sanction

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<sup>87</sup> See H.R. REP. NO. 95-459, at 2 (1977) (stating the purpose of IEEPA was to limit the President's powers and subject those powers to stricter oversight mechanisms).

<sup>88</sup> See *Revision of Trading with the Enemy Act: Markup of H.R. 7738 Before the House Comm. on International Relations*, 95th Cong., 1st Sess. (1977) (imploping Congress to adopt the amendments to TWEA because the statute granted the President "dictatorial powers" to be used without constraint of Congress).

regime against the entire country of Iran.<sup>89</sup> The long-term existence of these sanctions directly contradicts the original belief that IEEPA should be used to authorize controls in times of national emergency, but should not be used to isolate the people of the United States from another country long-term.<sup>90</sup> In some instances it is clear that Congress agrees with the direction of the President's IEEPA sanctions because they codify the declaration with legislation, but in other instances it is unclear if Congress's lack of action is assent, indifference, or something else.<sup>91</sup>

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<sup>89</sup> See Continuation of the National Emergency with Respect to Iran, 85 Fed. Reg. 72895, 72895 (Nov. 12, 2020) (affirming continuation of the national emergency declared on Nov. 14, 1979 for the forty-first time), see also Exec. Order No. 13059, 62 Fed. Reg. 44,531 (Aug. 19, 1997) (prohibiting the import or export of any goods originating in or destined for Iran).

<sup>90</sup> See *Revision of Trading with the Enemy Act: Markup of H.R. 7738 Before the House Comm. on International Relations*, supra note 79 at 10 (maintaining that the long-term use of total sanctions is an unwise foreign policy and that enforcement of such regulations can allow First Amendment infringements).

<sup>91</sup> See e.g., Iran and Libya Sanctions Act Of 1996, 104 Pub. L.

i. *IEEPA's Breadth of Power Must Be Limited Because It Currently Permits the President to Unreasonably Limit First Amendment Freedoms.*

IEEPA was meant to preserve constitutional freedoms and preclude policies that would entirely isolate the United States from people in other countries.<sup>92</sup> The result of sanctions regimes created under IEEPA has been the opposite: substantially isolating the United States from specific persons, countries, or organizations designated under IEEPA and infringing on U.S. Persons' First Amendment rights in the process.<sup>93</sup>

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172, 110 Stat 1541 (1996) (legislating, by Congressional vote, the imposition of sanctions on certain actors in Iran and Libya for their efforts in obtaining weapons of mass destruction); see also Exec. Order No. 12959, 60 Fed. Reg. 24,757 (May 6, 1995) (authorizing sanctions against Iran as a result of actions seen as a threat to United States national security).

<sup>92</sup> See *Report of the Committee on International Relations on H.R. 7738* at 15-16 (1977) (representing The Committee's belief that the First Amendment provides adequate protection for free speech, and the new statute would not impede that right).

<sup>93</sup> See *Open Soc'y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405 at \*22 (S.D.N.Y. Jan. 4, 2021) (holding in favor of Plaintiffs that their rights to free speech

The isolation caused by sanctions is - to an extent - the intended purpose of IEEPA: this temporary isolation is used as a bargaining tool by the United States Government to implore the sanctioned parties to cease the actions that gave rise to the sanctions.<sup>94</sup> That purpose is suitable for short-term sanctions but when individuals, countries, and organizations are sanctioned long-term or without sufficient deliberation, there is little if any political power left to the sanctions as they become the status quo.<sup>95</sup> The intended use of these emergencies was meant to be - by their nature - rare, brief, and declared only when there was a real emergency present, but the reality of

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were impacted when they were precluded from supporting the ICC).

<sup>94</sup> See Andreas F. Lowenfeld, Preface to the Second Edition of *International Economic Law*, at 850 (2d ed. 2008) (describing economic sanction as "economic controls for political ends" that express the issuing State's disapproval in an effort to change the sanctioned parties political or economic practice).

<sup>95</sup> See e.g., Continuation of the National Emergency with Respect to Iran, 85 Fed. Reg. 72,895, 72,895 (Nov. 12, 2020) (reaffirming sanctions for the thirty-ninth consecutive year because the "situation" that gave rise to the emergency is still impacting the United States).

IEEPA national emergencies has strayed far from that intention.<sup>96</sup> For example, the sanctions promulgated against TikTok in 2020 were enacted in a political climate that made it unclear if the motivation was personal to the President or actually in the best interest of national security.<sup>97</sup> By utilizing the magic words and claiming there was a "unique and extraordinary threat," the President has the power to promulgate sanctions against almost any party with minimal oversight outside of the statutory exemptions included in IEEPA.<sup>98</sup> With the current authority the

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<sup>96</sup> See *Report of the Committee on international Relations on HR 7738* at 10 (emphasizing that emergencies are rare and should not be equated with normal problems experienced); but see *Continuation of the National Emergency With Respect to the Proliferation of Weapons of Mass Destruction*, 85 Fed. Reg. 72,897, 72,897 (Nov. 12, 2020) (continuing a national emergency first implemented in 1994 for its sixteenth consecutive year).

<sup>97</sup> *Contra* Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020) (claiming that the data collected via the TikTok app threatened to allow the Chinese Communist Party access to Americans' personal information and track Federal employees).

<sup>98</sup> See 50 U.S.C. §1702(b)(1)-(4) (excepting from the Presidents power the limitation of personal communication that does not

President holds under IEEPA, sanctions regimes can be commonplace and grant the President unilateral power to enact sanctions with minimal justification or accountability before they go into effect.<sup>99</sup>

The consequences for violating any IEEPA sanctions are high: when a U.S. Person makes the business decision to deal with sanctioned individuals, they run the risk of racking up hundreds of millions of dollars in strict liability fines or even jail time.<sup>100</sup> In some instances this is logical: if a

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include the transfer of value, donations of certain kinds (unless the President determines they are necessary), importation and exportation of informational materials, and transactions incident to travel).

<sup>99</sup> See 5 U.S.C. § 553(a)(1) (2021) (excepting proposed rules involving “foreign affairs” or “military” functions of the United States from the note and comment process generally mandated under the APA).

<sup>100</sup> See e.g. BNP Paribas SA Settles Potential Civil Liability for Apparent Violations of Multiple Sanctions Programs 1, 1 (June 30, 2014)

[https://home.treasury.gov/system/files/126/20140630\\_bnp.pdf](https://home.treasury.gov/system/files/126/20140630_bnp.pdf)

(announcing that BNNP violated multiple sanctions regimes and

corporation subject to United States jurisdiction sells items to a sanctioned country or a person who is known to be dangerous, it is justifiable that the corporation should be held liable for this action.<sup>101</sup> Such dealings undermine the aforementioned negotiating power of the United States government and jeopardize the legitimate government interests in compelling dangerous actors to cease the activities that threaten U.S. national security.<sup>102</sup> Conversely, when U.S. Persons are seeking to

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agreed to pay \$963,619,900 for violations with a statutory civil penalty maximum of \$19,272,380,006); *see also* Inflation Adjustment of Civil Monetary Penalties, *supra* note 50 (announcing adjusted civil penalty for IEEPA sanctions to be a maximum of \$311,532).

<sup>101</sup> *See e.g.*, OFAC Settles with Amazon.com, Inc. with Respect to Potential Civil Liability for Apparent Violations of Multiple Sanctions Programs 1,3 (July 8, 2020)

[https://home.treasury.gov/system/files/126/20200708\\_amazon.pdf](https://home.treasury.gov/system/files/126/20200708_amazon.pdf) (announcing that Amazon violated multiple sanctions regimes and fulfilled orders for persons on the SDN List at the time of the orders; settling for a monetary penalty of \$134,523 when the maximum statutory penalty was \$1,038,206,212).

<sup>102</sup> *See* Andreas F. Lowenfeld, *supra* note 93 (insinuating that



support an internationally recognized justice organization or utilize a social media app, this liability is unreasonable to extend because there is a risk that there is no legitimate government interest in seeking to prohibit the actions of the sanctioned party.<sup>103</sup> Because all existing constraints on IEEPA are limitations on OFAC's enforcement, it is often unclear to the individual parties whether their actions will constitute a violation resulting in strict liability civil penalties.<sup>104</sup>

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economic sanctions are utilized by powerful governments to exert control over other countries' actions).

<sup>103</sup> See e.g., *TikTok v. Trump*, No. 1:20-cv-02658, 2020 U.S. Dist. LEXIS 232977, at \*42 (D.D.C. Dec. 07, 2020) (concluding that the Government violated the APA by preventing a company from operating in the United States without considering other methods for resolving the purported national security interest).

<sup>104</sup> See e.g., *Open Soc'y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*28 (S.D.N.Y., Jan. 04, 2021) (recounting the government's argument that the E.O. did not limit support for other ICC offices without giving a clear indication of what actions would give rise to liability).

*ii. Current Use of IEEPA Violates the Purpose of the Berman Amendment Because the President May Unconstitutionally Limit Protected Speech.*

The motivation behind the enactment of the Berman Amendment is simultaneously limited and exceptionally broad, but there is a consensus that the Amendment was meant to provide an additional layer of statutory protection to preserve First Amendment rights.<sup>105</sup> While the text of the Berman Amendment applies to informational materials, the vision of Congress in protecting First Amendment rights extends beyond a strict view of informational materials.<sup>106</sup> The logical reading of the limited legislative history at hand implies that Congress intended to protect all materials implicating the First

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<sup>105</sup> See *Cerunda v. Heavy*, 720 F. Supp. 1544, 1547-48 (S.D. Fla. 1989) (citing H.R. REP. NO. 100-40, pt. 3, at 113) (indicating that the Berman Amendment was enacted to codify the ABA's resolution regarding First Amendment protections of imports and applying the concept to exports as well, but noting that nothing further is stated as legislative history).

<sup>106</sup> See H.R. REP. NO. 103-482, at 239 (1994) (Conf. Rep) (positing that no actions may directly or indirectly limit the import or export of information protected by the First Amendment).

Amendment.<sup>107</sup> Narrower readings of the Berman Amendment - often proffered by the government in court - to construe informational materials narrowly have been rejected.<sup>108</sup> Instead, it is concluded that Congress's explicit indication that the Berman Amendment was to protect First Amendment activities negates the fact that reference to the First Amendment was excluded from the text of the amendment.<sup>109</sup> As such, continued infringement on First Amendment rights necessarily violates the purpose

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<sup>107</sup> See *Cerunda* 720 F. Supp. at 1550 (rejecting the government's narrow reading of the Berman Amendment and criticizing their argument that Congress intended limited First Amendment protection by using the phrase "informational materials").

<sup>108</sup> See *id.* at 1550, n. 10 (concluding that Congress's intent in enacting the Berman Amendment was to protect any information covered by the First Amendment).

<sup>109</sup> See H.R. REP. NO. 100-40, pt. 3, at 113 (1987) (referencing the A.B.A resolution as the purpose for creating the Berman Amendment legislation); see also *Report No. 1 of the Section of Administrative Law*, 110 ANNU. REP. A.B.A. 467, 517-18 (1985) (averring that actions protected by the First Amendment, such as scientific work products and other educational material, must be protected from the President's sanction power).

underlying the Berman Amendment.<sup>110</sup>

Within the legislative history of the Berman Amendment, the primary purpose for the legislation is to codify the resolution adopted by the American Bar Association House of Delegates with a similar recommendation, as such the House of Delegates Resolution is intrinsically tied to the legislative purpose behind the Berman Amendment.<sup>111</sup> As the report preceding the adoption of the Resolution states, Government actions that run the risk of chilling Constitutionally protected activity should be viewed with scrutiny.<sup>112</sup> The conclusion of the report states

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<sup>110</sup> See e.g., *Open Soc’y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*31 (S.D.N.Y., Jan. 04, 2021) (holding that should OFAC attempt to enforce sanctions against the academics’ work products, the Berman Amendment would protect them because their work was necessarily informational).

<sup>111</sup> See H.R. REP. No. 100-40, pt. 3, at 113 (1987) (articulating, in the only indication of purpose within the document, that the mission of the amendment was to codify the resolution adopted by the American Bar Association House of Delegates in 1985).

<sup>112</sup> See *Report No. 1 of the Section of Administrative Law*, 110 ANNU. REP. A.B.A. 467, 517-18 (1985) (arguing that actions chilling normal and essential scientific activity is a drastic

that removing the restrictions on First Amendment protected information would strengthen our constitutional system, and implores Congress to adopt the recommendations that were ultimately legislated in the Berman Amendment.<sup>113</sup> With this purpose in mind, it is clear that the current usage of IEEPA – even with the inclusion of the Berman Amendment – has disregarded the noble purpose of free flowing information in favor of restricting a plethora of activities that would make for a more fully informed and sophisticated citizenry.<sup>114</sup> For example, the restrictions created by E.O. 13928 and the sanctions against the ICC directly contradicted this purpose by limiting the free flow of legal scholars' expertise to an internationally recognized court and, furthermore, limited the actions and experiences that law students in American

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departure from United States policy and requesting protection of this ability from interference by the Government).

<sup>113</sup> See *id.* at 518 (asserting that protections of American access to foreign ideas and people is for the greater good of America and its citizens).

<sup>114</sup> See *id.* (positing that there should be no restrictions on the import of information that may be lawfully circulated in the United States to allow for broader education and expansion of knowledge of United States citizens).

universities could take in the course of their studies.<sup>115</sup>

While courts have begun to realize that the Berman Amendment and informational materials exceptions reach far beyond the typical conceptualization of informational materials, the path to recourse on the matter is still unnecessarily strenuous.<sup>116</sup> Presidents operate with the belief that IEEPA grants them unlimited power in promulgating these restrictions and thus the Berman Amendment's purpose is being repeatedly and blatantly violated by the Commander-in-Chief whose responsibility is to protect American safety, not to infringe on

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<sup>115</sup> See e.g., *Open Soc'y Justice Initiative v. Trump*, 2021 U.S. Dist. LEXIS 405, at \*12-\*13 (asserting that the sanction on the ICC caused a Professor of Law at the Cleveland-Marshall College of Law to abandon plans to supervise student research that would have been provided to the Office of the Prosecutor and thus potentially expose the professor to liability).

<sup>116</sup> See e.g., *TikTok v. Trump*, No. 1:20-cv-02658, 2020 U.S. Dist. LEXIS 232977, at \*5, \*44 (D.D.C., Dec. 04, 2020) (agreeing with Plaintiff's argument that the sanctions promulgated against a short-loop video sharing app indirectly regulated the exchange of informational materials).

constitutional rights.<sup>117</sup> Thus, courts' logic in finding that the Berman Amendment extends to technologies such as TikTok must also be extended to protect individuals who are subject to non-geographically specific sanctions.<sup>118</sup> A plain reading of the text is insufficient in instances of non-geographically-specific sanctions akin to the ICC regime.<sup>119</sup> Using the ICC case as an illustrative example, protection of materials flowing to the Netherlands - as the seat of the ICC - are irrelevant because the sanctions apply to a multi-national organization and are

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<sup>117</sup> See e.g., *Trump Twitter Archive*,

<https://www.thetrumparchive.com/> (type "try looking" into the search bar) (claiming that he has the right to limit all business that the United States conducts with Peoples' Republic of China because of IEEPA's power).

<sup>118</sup> See *Marland v. Trump*, No. 20-4597, 2020 U.S. Dist. Lexis 202572, at \*25 (E.D. Penn. Oct. 20, 2020) (holding that sanctions effectively banning TikTok would prevent the exchange of informational material because the videos on the app constitute informational materials).

<sup>119</sup> See E.O. 13928, *supra* note 8 (declaring a national emergency with respect to the ICC - an organization - and stating that individuals involved in supporting the organization would be designated to the SDN List).

targeted at individuals regardless of their location.<sup>120</sup> This is an instance where the courts must use their interpretation power to maintain the purpose and relevance of the Berman Amendment to protect First Amendment rights.<sup>121</sup>

*B. When Presented with Relevant Cases, The Judiciary Must Utilize Interpretation Power to Curtail First Amendment Violations Because Congress's Oversight Function is Limited.*

Although Congress intended for IEEPA to contain more direct oversight than TWEA did previously, as a result of Supreme Court decisions handed down after the inception of IEEPA, Congress must pass a veto-proof joint resolution as opposed to the originally intended legislative veto.<sup>122</sup> Congress has never repealed an IEEPA sanction regime or even introduced a

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<sup>120</sup> Cf. Press Release, ICC, The Registrar Inaugurates the ICC Field Office in Bangui (Oct. 18, 2007) (listing several field offices active at the time including operations in Uganda, Chad, and the Democratic Republic of the Congo).

<sup>121</sup> Cf. *Marland v. Trump*, 2020 U.S. Dist. Lexis 202572, at \*24 (extending Berman Amendment informational materials protections to the exchange of technology created on an application).

<sup>122</sup> See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that a veto provision is unconstitutional because it allows for one House of Congress to invalidate decisions of the Executive).



resolution to attempt this, which leaves open the question of whether the necessity of obtaining a veto-proof majority is too high for Congresspeople to consider, or whether the current use of IEEPA has represented Congress's wishes thus far.<sup>123</sup> Courts historically abide by the latter reasoning and construe Congress's lack of action as indication that they are satisfied with the course of action the President is taking with the IEEPA sanctions.<sup>124</sup> While this is a legitimate assumption, the reality is that it is significantly more difficult for Congress to repeal an IEEPA sanction regime than it is for a court to determine the regime is unconstitutional.<sup>125</sup> Since Congress is

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<sup>123</sup> See P.L. 99-93; 99 Stat. 405 (Aug. 16, 1985) (amending the NEA as the parent statute of IEEPA in 1985 to require a joint resolution, which is subject to the President's veto, to terminate a national emergency declared by the President).

<sup>124</sup> See e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) (stating that the Executive is entitled to high levels of deference when courts consider cases of interest to national security and foreign affairs).

<sup>125</sup> Cf. CHRISTOPHER A. CASEY, ET AL., *supra* note 19 at 46 (identifying two resolutions that introduced to attempt a "legislative veto" and terminate a national emergency under the NEA, neither

bound to enact a veto-proof resolution, federal courts have a responsibility to protect Constitutional rights impacted by the over-exuberant use of IEEPA by the President.<sup>126</sup>

- i. *Federal Courts Should Follow Reasoning akin to Open Society v. Trump Because the Court Correctly Reasoned That Some IEEPA Sanctions Regimes Impermissibly Violate First Amendment Rights.*

The use of IEEPA by President Trump exposed a weakness in the oversight mechanisms in IEEPA, and the prior case law around the topic only expanded the President's power by acting in overly deferential ways.<sup>127</sup> Due to the path prior case law was taking, the President may believe that IEEPA acts as a near limitless grant of power on matters of foreign trade and policy when this would go directly against Congress's purpose in

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resolution succeeded and neither resolution was in reference to an IEEPA emergency).

<sup>126</sup> See *Sierra Club v Trump*, 977 F.3d 853, 865 (asserting that the Supreme Court's decision in *Chadha* made it more difficult for Congress to check the President's use of emergency powers than originally intended).

<sup>127</sup> See e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) (stating that the Executive deserves highly deferential treatment when courts consider cases of interest to national security and foreign affairs).

enacting the statute.<sup>128</sup> By ruling that the freedom of speech for the Plaintiffs in *Open Society* was more important than the government's interest, the judge opened a small window of protection that was not previously enforced by the courts, but is invaluable to have.<sup>129</sup>

*Open Society* stands in stark contrast to the other First Amendment challenges that held categorically "there is no constitutional right to facilitate terrorism."<sup>130</sup> The judge in

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<sup>128</sup> See e.g., *Trump Twitter Archive*,

<https://www.thetrumparchive.com/> (type "try looking" into the search bar) (demonstrating that the President may believe IEEPA grants them powers that fall far outside of Congress's intended grant of power only in times of emergency).

<sup>129</sup> See *Open Soc'y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*30, \*31 (S.D.N.Y. Jan. 4, 2021) (holding that the sanctions on the ICC impose content-based and viewpoint-based restrictions on Plaintiffs due to the language of the E.O. and thus rejecting the government's position that the E.O. was content neutral on its face).

<sup>130</sup> See *Holy Land Foundation for Relief v. Ashcroft*, 333 F. 3d 156, 164 (D.C., 2003) (citing district court proceedings) (holding Plaintiff could not succeed on their First Amendment

*Open Society* correctly highlighted that the activities “for the benefit” of any persons designated pursuant to an Order is overbroad and allowed for infringement on First Amendment rights.<sup>131</sup> The language indicated as being restrictive of actions is included in most declarations of national emergency issued under IEEPA and thus the reasoning of the court should broadly be applied as a reasonable constraint of presidential power by the judiciary.<sup>132</sup> This is reconcilable with the narrow view taken in other cases because it will not expressly allow for dealing with blocked persons, but instead will give individuals the opportunity for clarity on what actions will expose them to liability.<sup>133</sup>

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challenge because their actions were in direct support of terrorist organizations).

<sup>131</sup> See *Open Soc’y Justice Initiative v. Trump*, 2021 U.S. Dist. LEXIS 405, at \*27 (agreeing with Plaintiffs that the language of the E.O. sweeps more broadly than necessary and limits actions that do not necessarily need to be limited).

<sup>132</sup> See e.g., E.O. 13224, *supra* note 16 (“any transaction or dealings by United States person . . . is prohibited, including . . . *for the benefit of such persons*”).

<sup>133</sup> See e.g., *Open Soc’y Justice Initiative v. Trump*, 2021 U.S.

Although the court in *Open Society* ultimately came to the correct conclusion, the use of strict scrutiny to reach that conclusion was unnecessary.<sup>134</sup> The court's reasoning that speech is limited by the E.O. based on the content of that speech is not correct on the face of the E.O.<sup>135</sup> As recognized in most courts, the Executive branch is granted a higher level of deference when issues of national security are present.<sup>136</sup> In

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Dist. LEXIS 405 at \*25 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)) (explaining that material support to terrorists is regulated by a test of whether the speech imparts "specialized knowledge" or only "general unspecialized knowledge" on the receiving party).

<sup>134</sup> See *id.* at \*24 (applying strict scrutiny because a person's speech will result in liability if and only if that speech is in support of blocked individuals).

<sup>135</sup> Compare *id.* at \*24 (rejecting the argument that the E.O. was content neutral and deserved intermediate scrutiny analysis) with *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F.Supp 2d 34, 52 (D.D.C., 2005) (accepting that a freedom of speech challenge to OFAC action warrant intermediate scrutiny).

<sup>136</sup> See e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) (stating that the President should receive highly

all cases concerning IEEPA E.O.s national security is an integral element of the pronouncement of the national emergency and the promulgation of the related sanctions.<sup>137</sup> Courts should not over correct by being overly deferential to allow the Executive broader power, but instead must walk a narrow line to balance deference to presidential power with constraint of incorrectly used presidential power.<sup>138</sup> Some occurrences of IEEPA challenges will require strict scrutiny when specific actions of the plaintiff are being infringed upon to control

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deferential treatment when courts consider cases of interest to national security and foreign affairs because the Executive serves as the primary authority on matters of foreign affairs).

<sup>137</sup> See e.g., *Open Soc'y Justice Initiative v. Trump*, 2021 U.S. Dist. LEXIS 405, at \*40 (citing *Ziglar v. Abbasi* 137 S.Ct. 1843, 1862 (1985) (recognizing a significant government interest in the creation of a sanctions regime, but not as applied to the scope of First Amendment infringement)).

<sup>138</sup> See e.g., *United States v. Lindh*, 212 F.Supp 2d 514, 556-57 (E.D. Va. 2002) ("Conclusive deference, which amounts to judicial abstention, is plainly inappropriate. Rather, the appropriate deference is to accord substantial or great weight to the President's decision").

their political association or speech.<sup>139</sup> As the judge noted in *Open Society*, the case would arrive at the same result if tested under intermediate scrutiny, and that is the proper standard to use when considering the limitations on actions for the benefit of a designated individual.<sup>140</sup> Applying strict scrutiny to all instances of this phrasing would create a slippery slope to invalidating many E.O.s and IEEPA sanctions programs that legitimately rely, in part, on that language for power.<sup>141</sup> Further, the government has a legitimate interest - in certain

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<sup>139</sup> *Cf.* Holder v. Humanitarian Law Project at 25-26 (applying strict scrutiny to the as-applied challenge to ADEPA because the speech Plaintiffs were using was political, but choosing not to apply strict scrutiny to the facial challenge because the government did not limit all of the pure political speech).

<sup>140</sup> *See id.* at 36 (reasoning that given the sensitive interest of national security and the Government's interest in preventing terrorism, it may be necessary to prohibit the material support of these organizations even where the First Amendment right of individuals is infringed upon).

<sup>141</sup> *See e.g.*, E.O. 13224, *supra* note 16 (utilizing the broad language of "any services" to provide OFAC with the power to designate and prohibit transacting with individuals who commit, threaten to commit, or support terrorism).

circumstances - in broadly limiting actions that will result in the support of terrorism.<sup>142</sup>

*ii. Federal Courts Should Apply a Modified Intermediate Scrutiny Test to IEEPA Cases Because of the Unique First Amendment Infringements Posed by Unilateral Presidential Power.*

It is proper for courts to analyze First Amendment challenges regarding IEEPA actions under intermediate scrutiny in many instances, but the historically used test is inadequate to protect First Amendment rights impacted by IEEPA backed sanctions.<sup>143</sup> In instances of both intermediate and strict scrutiny, a test must be used to determine if the restrictions to the freedom of speech are permissible under the First Amendment.<sup>144</sup>

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<sup>142</sup> See *Global Relief Found. Inc., v. O'Neill*, 207 F.Supp.2d 779, 806 (N.D. Ill. 2002) (deciding that in instances where speech and non-speech are comingled, the Government's interest in prohibiting the non-speech actions may supersede Plaintiff's interest in not having their speech actions controlled).

<sup>143</sup> See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000) (concluding that intermediate scrutiny is proper for First Amendment challenges when the law is content-neutral).

<sup>144</sup> See e.g., *Open Soc'y Justice Initiative v. Trump No.*



While historical tests provide an important baseline, the elements are often cyclical or self-fulfilling in nature: the first two elements of the *Humanitarian Law Project v. Reno* test are cyclical in nature with the legality of any E.O. under IEEPA, and the answer will always be yes.<sup>145</sup> If the answer to those questions is no, the E.O. will be struck down on grounds apart from the First Amendment thus providing no substantial constitutional protection for First Amendment rights.<sup>146</sup> The third element of that test is useful for identifying if the regulation is facially unconstitutional, and if the answer is

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20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*26 (S.D.N.Y., Jan. 04, 2021) (expressing the strict scrutiny test as requiring the government to prove a substantial interest in limiting the speech actions), *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F.Supp 2d 34, 53 (D.D.C., 2005) (enumerating a four element test to determine in limitations of free speech are minimal enough to pass intermediate scrutiny).

<sup>145</sup> See *Humanitarian Law Project v. Reno* at 1135 ("is the regulation with the power of the government? Does it promote an important or substantial government interests?").

<sup>146</sup> See 50 U.S.C § 1701(a) (stating that the President has the authority to declare a national emergency for any unusual and extraordinary threat) (emphasis added)

no, that mostly indicates to the Plaintiffs that they should be challenging the order under other laws.<sup>147</sup> The final question regarding necessary infringement on First Amendment Freedoms is the primary protection for U.S. persons subject to IEEPA sanctions controls and solely ponders if the First Amendment restrictions are minimal enough, but this is not sufficient.<sup>148</sup> The balancing test employed by many courts bolsters the final element marginally by requesting that the court considers the consequences of their actions, but this is again inadequate protection for individuals facing potential constitutional infringements.<sup>149</sup>

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<sup>147</sup> See, Humanitarian Law Project v. Reno at 1135 ("Is [the substantial government interest] unrelated to suppressing free expression?").

<sup>148</sup> See e.g., Humanitarian Law Project v. Reno, 205 F.3d at 1135 (stating that the First Amendment infringements must be "minimal enough" to be justified by the government and thus permissible).

<sup>149</sup> See e.g., Open Soc'y Justice Initiative v. Trump, 2021 U.S. Dist. LEXIS 405, at \*39-40 (noting that the brief for the government argues that there is always a significant national security and foreign policy interest at stake with sanctions and an injunction would interfere with how the President determined is best to proceed in the situation).

An additional element of protection is necessary in the form of adding a fifth question when applying this test to IEEPA cases.<sup>150</sup> The fifth element should question if there is sufficient evidence that the restriction on First Amendment rights is necessary to promulgate the purpose underlying the regulation.<sup>151</sup> This element would be analyzed in much the same way as regulations challenged under the APA, with due deference given to the enforcing agency and analysis of the stated record to determine reasonableness.<sup>152</sup> This standard would be used to

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<sup>150</sup> See Brief for Brennan Center for Justice as Amicus Curiae Supporting Plaintiffs at 22, *Open Soc’y for Justice v. Trump*, 2021 U.S. Dist. LEXIS 405 (claiming that the Executive’s power needs to be subject to “exacting judicial scrutiny” from the federal courts who have interpretive power).

<sup>151</sup> *Cf. e.g., Open Soc’y Justice Initiative v. Trump*, 2021 U.S. Dist. LEXIS 405, at \*28 (showing that it is significant to determine if a restriction prohibits only speech the Government believes is necessary to achieve its substantial interest).

<sup>152</sup> See *e.g., TikTok v. Trump*, No. 1:20-cv-02658, 2020 U.S. Dist. LEXIS 232977, at \*40 (D.D.C., Dec. 04, 2020) (citing *Holy Land*, 333 F.3d at 162) (following the well-established concept that the arbitrary and capricious standard does not allow courts to

maintain a level of deference to the enforcing agency while providing an additional layer of protection for constitutional rights without overly restricting presidential power granted by IEEPA.<sup>153</sup> Although the additional question is similar to some existing intermediate scrutiny standards, it delineates between breadth and necessity of First Amendment infringements.<sup>154</sup> This question directs courts to consider the necessity of the First Amendment infringement for supporting the resolution of the underlying national security threat whereas other tests look to the quantity of First Amendment infringements to determine reasonableness.<sup>155</sup>

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undertake their own fact finding, but instead to review the agency's record for rational conclusions).

<sup>153</sup> *Cf. e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) (emphasizing that the Executive is entitled to deference when courts consider cases of involving interest in national security and foreign affairs).

<sup>154</sup> *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000) (necessitating only that the restrictions on First Amendment protected language be "no more than necessary").

<sup>155</sup> *See generally id.* at 1136 (seeking to determine whether the statute is overbroad in its application of First Amendment

In addition to this new element, courts should employ independent fact-finding requirements with regards to the second element questioning substantial government interest.<sup>156</sup> This step will protect plaintiffs from the government's ability to simply point to the so-called magic words used in almost every IEEPA E.O. that says there is a substantial government interest in the matter, and thus fulfilling the primary requirement of previous intermediate scrutiny tests.<sup>157</sup> This independent studying would necessitate the President have justifiable purposes for enacting the national emergency and provide judicial oversight to ensure the purpose is valid after the fact.<sup>158</sup> This would also serve to mitigate the designation of

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restrictions but not considering whether the restrictions supported the initial purpose underlying the sanctions).

<sup>156</sup> See *e.g.*, PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY*, 148-79 (2008) (arguing that judges should employ a level of independence that allows them to act fairly).

<sup>157</sup> *Cf.* 50 U.S.C. § 1701(a) (authorizing the President to utilize IEEPA powers when there is an unusual or extraordinary threat that provides an interest in protecting the United States).

<sup>158</sup> *Cf.* *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that the Judiciary has the power to review actions taken by the Executive and deem them unconstitutional when relevant).

individuals and organizations that cannot be proven as a substantial threat to the national security of the United States.<sup>159</sup>

By applying this test, courts will have a more equitable balance of First Amendment rights protections while still allowing the President to have a broad grant of power under IEEPA.<sup>160</sup> This test would formally solidify the reasoning used in *Open Society* that protects U.S. Persons' rights of free speech and association from undue infringement when the President declares a national emergency under IEEPA, but would not overly restrict presidential power granted to the President

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<sup>159</sup> *But see* Remarks to the Press, Michael R. Pompeo, Secretary of State (June 11, 2020)(on file with author) (justifying the designation of an international human rights attorney because of a claim that they are not pursuing real justice and claiming that America must take this action in the pursuit of justice).

<sup>160</sup> *See e.g.*, 50 U.S.C. §1702(c) (authorizing judicial review of sanctions regimes and records despite reliance on confidential information); *see also* *Open Soc'y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*27 (S.D.N.Y, Jan. 04, 2021) (holding that when there is no basis to doubt the Government's legitimate interest in sanctions promulgation, the Executive will be awarded deference).

by IEEPA.<sup>161</sup>

The application of this test will not cause all IEEPA cases to result in different holdings: for example, this test would not modify the result of *Al Haramain Islamic Foundation, Inc. v. United States*.<sup>162</sup> As to the first question of whether the regulation is within the power of the government, IEEPA has been upheld on multiple occasions as a constitutional delegation of power to the President and the Department of Treasury.<sup>163</sup> As to the second question of whether there was an important or substantial government interest in the regulation, the court stated that due to the national security interest at stake, the

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<sup>161</sup> See e.g., *Open Soc'y Justice Initiative v. Trump*, 2021 U.S. Dist. LEXIS 405, at \*40-\*41 (finding that when a balance of equities is conducted, the protection of First Amendment rights outweighs that of the government but noting that in content-neutral cases this may garner different results).

<sup>162</sup> See *Al Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, 585 F.Supp 1233, 1267 (D. Or., 2008) (holding that the challenged law does not unnecessarily punish protected free speech or violate the First Amendment).

<sup>163</sup> See e.g., *United States v. Dhafir*, 461 F.3d 211, 212-13 (2d Cir. 2006) (holding that IEEPA constitutes an appropriate delegation of congressional authority to the executive).

government had a legitimate national security interest in limiting the ability to finance terrorist organizations.<sup>164</sup> Regarding the third question of whether the regulation is unrelated to suppressing free expression or association, the restrictions applied were for the purpose of limiting financial support to terrorists above all other purposes and thus there was only an incidental restriction of free speech.<sup>165</sup> On the fourth question of whether the regulation does or does not substantially burden protected actions more than is necessary, the limitations imposed by the sanctions program in that instance did not punish a substantial amount of protected free speech.<sup>166</sup> On the final, new, question regarding whether the incidental restriction is necessary to promote the purpose of

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<sup>164</sup> See *Al Haramain Islamic Found., Inc. v. United States Dep't of the Treasury* at 1267 (interpreting the E.O. and related legislation as being tailored specifically to the prohibition of financing terrorist organizations).

<sup>165</sup> See *id.* (determining that the restrictions put forth in the executive order are content neutral and do not directly infringe on First Amendment rights as written).

<sup>166</sup> See *id.* (finding that the regulation was targeted solely at inhibiting individuals from financing terrorist organizations which is not a right protected by the First Amendment).



the E.O., the incidental restrictions on First Amendment rights of speech and association would be justified for the greater purpose of stemming assistance to terrorist groups.<sup>167</sup>

Conversely, the new question - whether the First Amendment restrictions are necessary to promote the purpose of the E.O. - would not permit overreaching infringements to First Amendment rights akin to those seen in *Open Society*.<sup>168</sup> The addition of the fifth question would result in striking down the ICC restrictions at least in part: the purpose of the E.O. was to dissuade the ICC from investigating the United States' alleged war crimes, but the sanctions impeded speech actions related to the advocacy for international rights of children in countries

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<sup>167</sup> See *id.* at 1266 (acknowledging that it is possible to conjure a hypothetical where known humanitarian aid organizations such become designated pursuant to the executive order but stating that the mere possibility of this does not make the incidental First Amendment restrictions impermissible).

<sup>168</sup> See *Open Soc'y Justice Initiative v. Trump*, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*38-\*39 (S.D.N.Y., Jan. 04, 2021) (finding the Plaintiffs were likely to suffer irreparable harm as a result of having their First Amendment rights violated).

experiencing armed conflicts.<sup>169</sup>

It is imperative that when the judiciary acts to constrain presidential power it is maintaining neutrality and independence as the Constitution requires.<sup>170</sup> When the judiciary utilizes this proposed test it will not overstep the bounds of neutrality or independence because it will simply employ judicial interpretation power.<sup>171</sup> Throughout the history of the United States, the judiciary has created tests to apply in analogous situations and promote uniformity in results, this is the

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<sup>169</sup> *Cf. id.* at \*7 (introducing one of the plaintiffs as a law professor at the University of Georgia School of Law who was previously trained for the ICC on matters relating to crimes against children and children in warzones, but ceased these actions because of Bensouda's designation); *see also id.* at \*22 (identifying the Government's interest as exerting leverage over the ICC and deterring them from pursuing investigations).

<sup>170</sup> *Cf. Marbury v. Madison*, 5 U.S. 137 (1803) (holding that the Judiciary should uphold Article III and IV of the Constitution when reviewing the constitutionality of actions taken by other branches of the government).

<sup>171</sup> *See e.g., NLRB v. Canning*, 573 U.S. 513, 557 (2014) (positing that in all cases the Constitution must be interpreted in light of the text, purpose, and experience as a nation).

same.<sup>172</sup>

#### IV. POLICY RECOMMENDATION

The best argument for the judiciary utilizing legitimate First Amendment interests to restrict unilateral presidential powers lies in the fact that the judiciary opened this so-called can of worms to begin with.<sup>173</sup> Due to the historic actions of the court in removing oversight powers from Congress, resulting in a broader grant of power to the President, a power vacuum has opened that has allowed the President to act without oversight in ways that neither Congress nor the judiciary intended.<sup>174</sup> Until Congress opts to pass a resolution to constrain the President's unilateral power in regards to IEEPA without

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<sup>172</sup> See e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (creating the first recognized intermediate scrutiny test to determine if the state's actions violated the First Amendment).

<sup>173</sup> See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (limiting Congress's oversight of Presidential actions and designating the judiciary as the ultimate check on presidential powers).

<sup>174</sup> See *Revision of Trading with the Enemy Act: Markup of H.R. 7738 Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 5 (1977) (adopting the NEA and IEEPA as a way to reform TWEA power that had become overreaching).

creating a political battleground, the burden falls to the judiciary to reckon with the results of the precedent they created.<sup>175</sup>

Until the Trump presidency, courts were on a clear trend of expanding executive power by holding in favor of the government in many cases challenging executive orders.<sup>176</sup> While it is unclear if this trend will continue, when cases were brought to the courts that challenged clearly overreaching unilateral declarations, it fell to the judiciary to act in its power as a balance to the executive.<sup>177</sup> By enforcing a standardized test

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<sup>175</sup> Cf. Limiting Emergency Powers Act of 2021, H.R. 63, 117th Cong. §2(a) (as introduced in the House, Jan. 04, 2021) (proposing an amendment to the NEA, and consequentially IEEPA, that would force all declared national emergencies to expire within thirty days of declaration is no parallel legislation has been passed to support the declaration).

<sup>176</sup> Erica Newland, Note, *Executive Orders In Court*, 124 YALE L.J. 2026, 2035, 2040 (2015) (reporting that after analyzing 297 judicial opinions on executive orders, more than 40% ruled in favor of the government and thus expanded Executive power).

<sup>177</sup> Cf. *Marland v. Trump*, No. 20-4597, 2020 U.S. Dist. Lexis 202572 at \*20 (E.D. Penn., 2020) (holding that video content on

that will result in analogous holdings across the board on similar cases, the judiciary can use its power in the checks-and-balances system to make it clear to the President that infringement on Constitutional rights is not permissible.<sup>178</sup>

Further, there is a distinct interest in not over-burdening the President in instances of national emergencies and threats to national security.<sup>179</sup> Creating a statutory limitation on the President's exercise of power in instances of national threats may greatly inhibit the President's ability to protect the United States and its assets.<sup>180</sup> The presence of the Berman

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an app constitutes informational materials by analogizing the content to artwork when presented with the novel question).

<sup>178</sup> See Kenneth Lowande and Jon C. Rogowski, *Presidential Unilateral Power* at 5 (hypothesizing that strategic Presidents will see the pattern judicial and congressional oversight is taking and tailor their unilateral powers so as to avoid their mandates being overturned by the judiciary or by Congress).

<sup>179</sup> See CHRISTOPHER A. CASEY ET AL, *supra* note 19 at 27 (positing that IEEPA is a source of authority for the President to quickly impose economic sanctions in times of emergency without the incumbrance of prior limitations).

<sup>180</sup> *Cf.* 5 U.S.C. § 553(a)(1) (2021) (excepting proposed rules

Amendment, discussed above, provides statutory protection to individuals by limiting the enforcement of sanctions, but does not limit the President's initial power in promulgating a national emergency and IEEPA sanctions program.<sup>181</sup> Other protections of this kind are provided by OFAC in the form of licenses that allow individuals to transact with sanctioned parties in ways that may otherwise be construed as impermissible under the President's order.<sup>182</sup> As such, the judiciary can work

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involving "foreign affairs" from the note and comment process generally mandated under the APA thus removing a substantial barrier to implementation of rules).

<sup>181</sup> See generally Exec. Order No. 13873, 84 Fed. Reg. 22689, 22690 (acknowledging that the order targeting the ICC would be implemented consistent with applicable laws); *but see* Open Soc'y Justice Initiative v. Trump, No. 20Civ.8121, 2021 U.S. Dist. LEXIS 405, at \*36 (S.D.N.Y. Jan. 04, 2021) (recognizing the government's argument that the order was enacted with the caveat that the IEEPA and Berman Amendment applied, but still stating that if OFAC enforced the order against the Plaintiff's actions it would violate the Berman Amendment).

<sup>182</sup> See U.S. DEP'T OF TREASURY FAQ <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1506> (last visited Mar.

in tandem with the statutory exemptions and OFAC licensing structures by enforcing post-enactment constraints on unilateral presidential powers through legal challenges.<sup>183</sup> This strikes the best balance of constraint and grant of power as it protects individuals from liability without creating a complex bureaucratic process that delays the President from acting in instances that require immediate response.<sup>184</sup>

The United States also holds a unique power in that the

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21, 2021) (defining a general license as a broad allowance for any party to conduct transactions that would otherwise be prohibited whereas a specific license as written individualized and narrow approval to conduct transactions otherwise limited).

<sup>183</sup> *Cf.* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25 (2010) (“concerns of national security and foreign relations do not warrant abdication of the judicial role.”). *See e.g.*, Publication of Web General Licenses Issued Pursuant to the Venezuela Sanctions Regulations, 85 Fed. Reg. 76,450, 76,450 (Nov. 30, 2020) (issuing General Licenses allowing exports that were previously prohibited by E.O.s issued between 2015-2019).

<sup>184</sup> *See* CHRISTOPHER A. CASEY ET AL, *supra* note 19 at 1 (recognizing that IEEPA is a useful tool for the President to quickly implement their will or the will of Congress).

entire world is wary of U.S. sanctions regimes.<sup>185</sup> The penalties for violating U.S. sanctions are high and chill a significant amount of trade and investment that may be permitted, but because it is too close to the line of legality, individuals will err on the side of caution to avoid liability.<sup>186</sup> While this power is a strength for the United States, it must be exercised in equitable ways that do not chill, say, support for victims of humanitarian violations in Syria.<sup>187</sup> Sanctions are

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<sup>185</sup> See, Aron Lund, *Briefing: Just How 'Smart' Are Sanctions on Syria?*, THE NEW HUMANITARIAN (April 25, 2019), <https://www.thenewhumanitarian.org/analysis/2019/04/25/briefing-just-how-smart-are-sanctions-syria> (contending that European investors are warier of U.S. sanctions than E.U. sanctions).

<sup>186</sup> See *id.* (maintaining that although parties in the humanitarian sector are exempted from American sanctions, when those organizations attempt to deal with banks and other private sector actors there is a "chilling effect" caused by the existence of a sanctions regime that causes the humanitarian organizations to struggle with carrying out their purpose).

<sup>187</sup> See *id.* (proposing that the United States make better use of humanitarian aid exemptions in sanctions regimes to prevent further harming the individuals they purport to be advocating for with the sanctions regimes).



currently the path of least resistance, but they may not always be the best option.<sup>188</sup> Court's ability to act as a check on the executive is imperative in ensuring that the United States' sanctions regimes do not impermissibly overstep their purpose.<sup>189</sup>

## V. CONCLUSION

Since Congress's grant of power to the President to impose sanctions under IEEPA, those powers have constantly expanded in scope.<sup>190</sup> When considering the best method the judiciary can

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<sup>188</sup> See Press Statement, Antony J. Bilken, Secretary of State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court (April 2, 2021) (on file with author) (announcing the revocation of sanctions against the ICC and acknowledging that concerns about the ICC's activities are better addressed through engagement with other State parties rather than through imposition of sanctions).

<sup>189</sup> See *id.* (acknowledging that the imposition of sanctions is not always the most effective or pertinent way to induce the ICC to cease its investigations).

<sup>190</sup> See CHRISTOPHER A. CASEY ET AL, *supra* note 19 at 17-18 (inspecting trends in IEEPA sanctions and finding that IEEPA sanctions, on average, last longer and are declared for vaguer reasons than TWEA's previous sanctions regimes).

take to limit the overbroad reach of this power, the First Amendment is the most successfully used Plaintiff's argument against potentially over-reaching sanctions.<sup>191</sup> The court in *Opens Society Justice Initiative v. Trump* recognized that the broad language used in many E.O.s gives rise to unconstitutionally limiting freedom of speech.<sup>192</sup> A more stringent check on the language and implementation of sanctions pursuant to IEEPA can act as an effective balancing against executive power to ensure the President is not enacting overreaching sanctions that do not promote the purpose of IEEPA as a control on terrorism and legitimate national emergencies.<sup>193</sup>

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<sup>191</sup> See *Open Soc'y Justice Initiative v. Trump*, No 20Civ.8121 2021 U.S. Dist. LEXIS 405, at \*40-41 (S.D.N.Y. Jan. 04, 2021) (holding in favor of the Plaintiffs to grant injunctive relief and enjoin the government from enforcing civil or criminal liability against the enumerated activities that Plaintiffs believed may give rise to such liability).

<sup>192</sup> See *id.* at \*40-41 (holding that the proffered national security justification alone was insufficient in the face of Plaintiff's First Amendment rights claims).

<sup>193</sup> See *e.g.*, *Trump Twitter Archive*, <https://www.thetrumparchive.com> (type "try looking" into the

As a result of closer inspection of First Amendment restrictions imposed by IEEPA sanctions, courts will necessarily need a new test to assess the threat.<sup>194</sup> This new test must balance the legitimate interests of the United States Government in the protection of national security and enforcing foreign policy with the First Amendment rights of individuals who are directly impacted by the promulgation of these sanctions.<sup>195</sup> As Congress has not created a carveout to IEEPA powers in more than three decades, the courts taking this step to constrain presidential power assures the protection of First Amendment rights without requiring Congress to surmount the difficult task of legislating

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search bar) (substantiating the assertion that at least some past Presidents believe IEEPA grants them broad powers outside the scope of those intended).

<sup>194</sup> See *Open Soc'y Justice Initiative v. Trump*, 2021 U.S. Dist. LEXIS 405, at \* 17, 21, 39 (combining multiple elements and balancing analyses to come to the conclusion that Plaintiff's First Amendment rights were violated and thus demonstrating a potential need for a novel test on this subject).

<sup>195</sup> *Cf. id.* at \*40 (reiterating the necessity of balancing legitimate public interests but asserting there is no legitimate interest in enforcing unconstitutional laws and actions).

modified Executive powers.<sup>196</sup> This move to protect constitutional rights is one that courts are ready and willing to take on, and with this modified test they have the resources to enact equitable justice in the face of national security concerns.

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<sup>196</sup> *Cf. e.g.*, 50 U.S.C. § 1702(b)(3) (amending IEEPA in 1988 to exclude informational materials, the last substantive restriction placed on presidential powers under IEEPA).